Filed 8/27/19 P. v. Ortiz CA3
On transfer

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ABEL ORTIZ, Defendant and Appellant.	C079847 (Super. Ct. No. 13F05800) OPINION ON TRANSFER

A jury convicted defendant Ricardo Abel Ortiz of unlawful driving or taking of a vehicle (Veh. Code, § 10851) and driving on a suspended license (Veh. Code, § 14601.1). The trial court sentenced defendant to a split term of 18 months in county jail and 18 months of mandatory supervision.

On appeal, defendant contends the prosecutor committed prejudicial misconduct during closing argument that was not cured by the trial court's admonition. He also asserts that his Vehicle Code section 10851 conviction is eligible for misdemeanor

sentencing pursuant to Penal Code section 490.2. (Unless otherwise set forth, stautory references that follow at to the Penal Code.)

We affirmed the judgment in a previous opinion. In this opinion, at the direction of the California Supreme Court, we reconsider the Vehicle Code section 10851 conviction in light of *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) and *People v. Lara* (2019) 6 Cal.5th 1128 (*Lara*). On remand, we conditionally reverse the conviction for unlawful taking or driving, vacate the sentence, and remand for retrial on the election of the People and resentencing.

BACKGROUND

The Crimes

Around July 25, 2013, Rafael Zepeda Garcia's blue 1989 Nissan Pathfinder was taken from the front of his Sacramento County home between 8:30 p.m. and 5:00 a.m. He had the keys for the truck when it was taken. Garcia's wife Susana Ortiz saw another person driving her husband's truck after it was taken.

On September 5, 2013, California Highway Patrol Officer John Rosendale stopped Garcia's Pathfinder on Stockton Boulevard at around 3:00 a.m. The truck was running even though there was no key in the ignition. Defendant, the driver, told Officer Rosendale that his driver's license was suspended. After determining the truck had been reported stolen, Officer Rosendale arrested defendant. A search of the truck found a pair of scissors and a screwdriver on the passenger seat.

Officer Rosendale obtained a *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] waiver from defendant and questioned him about the Pathfinder. Defendant admitted using the scissors to start it. Defendant also told Officer Rosendale that he never knew of a motor vehicle being started with anything other than a key unless it was stolen.

The truck was eventually returned to Garcia. The tailgate had been removed, as well as the heater, the air conditioner, and Garcia's tool boxes. The driver's side door handles were broken.

The prosecution introduced evidence of prior Vehicle Code section 10851 offenses under Evidence Code section 1101, subdivision (b). In 1995, Hat Tui Vu owned a 1983 Buick Century. Police knocked on her door one day to tell her that her car had been stolen and recovered. The car's lock and ignition were broken.

On February 4, 1995, Sacramento County Sherriff's Sergeant Todd Gooler saw defendant driving the Buick. The condition of the car was consistent with it being stolen, as there was no key in the ignition, the steering locking mechanism was broken, and the left side of the steering column was broken off. Defendant said the car belonged to his aunt. When asked for his aunt's name, defendant looked at the passengers and asked what was her name. Defendant later acknowledged taking the car.

Defense Evidence

Branndon Estrada knew defendant's brother Jonas Ortiz (Ortiz) through an ex-girlfriend. He had briefly lived with Ortiz before moving in with his girlfriend. One day while doing yard work at his girlfriend's house, a man named Darryl drove up on a motorcycle and asked Estrada if he was interested in buying the vehicle. Estrada declined as he had no money.

One to two weeks later, Darryl came up in a van and offered to sell it to Estrada. Estrada and his girlfriend gave him about $50 for a down payment. Darryl took back the van after two days.

Darryl came by in a baby blue work truck several days later. He offered to sell the truck to Estrada, but Estrada declined as he had no money. Estrada told Darryl that defendant's brother would be interested, so he then took Darryl to see Ortiz, who lived nearby. Darryl and Ortiz talked; Estrada did not overhear the conversation but observed

the two men exchanging keys. He saw Ortiz driving the blue truck about three months later.

Thileah Reynolds rented a bedroom to Ortiz and his girlfriend between July and October 2013. Ortiz first drove a small two-door car and then a black convertible. He started driving a blue pickup truck around August 1.

On September 5, 2013, defendant came to Reynolds's home and went upstairs to see his brother. Reynolds heard the truck drive off when defendant left.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct by invoking peer pressure to persuade the jury to vote guilty, "essentially encouraging them to convict appellant in order to avoid social condemnation, rather than on the evidence presented."

During closing argument, defense counsel addressed the beyond a reasonable doubt standard and told the jury that "an abiding conviction is what we term a long-lasting belief," and that "you have to decide this case and have a long lasting belief that whatever verdict you're rendering is what you believe."

The prosecutor concluded her rebuttal as follows:

"Without rehashing all of the evidence, I will tell you that people in this courtroom, in Sacramento, all over California convict people on a beyond a reasonable doubt standard every single day. Despite what Defense is saying, it's not some insurmountable burden that can't be reached. It's not beyond all possible doubt or beyond all imaginary doubt. It's just,--it's when someone asks you about this case a week from now when the admonition is finally lifted and you can talk about it, if anyone is even interested in talking about it, and they will ask you what was this trial all about, and you tell them, well, we heard this evidence of this man, Ricardo Abel Ortiz, when he

was 14, he stole a car. He messed with the steering column. He lied to the police officer. The police officer asked him whose car is it. He lied and he said it's my aunt's car. And the police officer asked him what's your aunt's name. He looked over and whispered to his friends, what's my aunt's name. He was found with two screwdrivers and a flashlight in the car back in 1995.

"Then they'll ask you what happened in this case. You'll say, well, it was similar in this case. He's in a car that has no AC, the locks aren't working, the ignition clearly isn't working, and it's being started with [a pair of] scissors. Not only does he start the car with a pair of scissors, you'll tell your friend he also has a screwdriver in the car right next to the driver's seat. You'll--your friend will ask you, well, did anybody ask him if he's ever heard of cars that start with anything but keys, and you'll be able to tell them, you know what, he did, in fact, tell the officer that. He told the officer the only type of car I've ever heard of that starts with anything but a key is a stolen car.

"Your friend's going to ask you, you voted guilty, didn't you. And you're going to say, yes, I voted guilty because the case was proven beyond a reasonable doubt. That's the abiding conviction that we're talking about. And I'm asking you to vote guilty not because [of] what I'm saying. You have to do it because the evidence shows that the Defendant is guilty of driving that car. We know it was stolen. I'm asking you to do the right thing in this case and just hold him accountable for his actions on that day. Thank you."

Before excusing the jury for a break, the trial court gave the following admonition:

"I did want to make one point before we break on a closing. Your decision--and you will get this instruction. Your decision will be based solely upon the evidence that comes into this Court and the law that I give you. Counsel made an argument and an analogy about your friends and so forth, but please, everyone must understand peer pressure, or what somebody asks you, your response to what they might ask you in the future would not be a proper basis for your decision in the case. It must be based on the

evidence that came in, the law that you're given regardless of what somebody may ask you in the future, okay."

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 606.) " 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742.)

However, "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety. [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Nonetheless, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).)

Defendant did not object to the argument in question or to the trial court's admonition, forfeiting his contention. Defendant's claim also fails on the merits. At worst, the prosecutor was improperly invoking peer pressure to support a guilty verdict. Any impropriety in the prosecutor's argument was cured by the trial court's immediate admonition, which correctly informed the jury that it must base its decision only on the

evidence and the law, and what others might ask a juror in the future was not a proper basis for a verdict. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Defendant's assertion regarding prosecutorial misconduct that " ' "[y]ou can't unring a bell" ' " (see *Hill, supra,* 17 Cal.4th at p. 845) is misplaced. The Supreme Court made this analogy in *Hill* due to the jury having heard "not just a bell, but a constant clang of erroneous law and fact." (*Ibid*.) This was not the case here. Since the admonition cured any harm caused by the argument, defendant's claim fails on the merits.

II

Proposition 47

As pertinent to this case, Proposition 47 added section 490.2, which states in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).) Defendant asserts that Vehicle Code section 10851, unlawfully taking or driving a vehicle, is a theft offense subject to section 490.2.

In *Page*, the California Supreme Court held that Proposition 47's $950 threshold applied to unlawfully taking a vehicle under Vehicle Code section 10851, but not to prosecutions under that statute for post-theft unlawfully driving a vehicle. (*Page, supra,* 3 Cal.5th at p. 1187; see *Lara, supra,* 6 Cal.5th at pp. 1135-1136.) *Page's* interpretation of Proposition 47 applies to cases tried after the proposition went into effect. (*Lara,* at p. 1135.) Such is the case here. Since defendant was tried after Proposition 47 took effect, one element of a felony violation of Vehicle Code section 10851 under an unlawful taking theory is that the vehicle taken is worth more than $950.

Defendant was charged with violating Vehicle Code section 10851 under both the unlawful driving and unlawful taking theories. On remand he contends there was insufficient evidence to convict him of a felony violation of Vehicle Code section 10851 as there was no evidence of the vehicle's value. In *Lara*, the Supreme Court rejected a similar challenge, holding: "defendant's contention that the evidence at trial was insufficient to support a felony conviction of Vehicle Code section 10851 is easily rejected. Although no evidence was presented of the vehicle's value, the evidence amply supported a theory of posttheft driving, which does not require proof of vehicle value in order to be treated as a felony." (*Lara*, *supra*, 6 Cal.5th at p. 1137.)

The same applies here. Defendant was found driving the vehicle amost six weeks after it was taken from the victim. "Posttheft driving in violation of Vehicle Code section 10851 consists of driving a vehicle without the owner's consent after the vehicle has been stolen, with the intent to temporarily or permanently deprive the owner of title or possession. Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft. [Citations.]" (*Page*, *supra*, 3 Cal.5th at p. 1188.) In light of the substantial break between the vehicle's theft and defendant being found driving it, there is substantial evidence to support his conviction under an unlawful driving theory.

Defendant also contends his Vehicle Code section 10851 conviction cannot stand as a felony due to instructional error. We agree. The jury was instructed on the unlawful taking theory, but it was not instructed that one element of the crime was that the vehicle be worth more than $950. Failure to include that element in the instructions allowed defendant to be convicted of a felony violation of Vehicle Code section 10851 under a legally invalid theory.

We reject the Attorney General's contention that this error was forfeited. *Page* was decided after the trial. Failure to raise an objection based on this yet undecided case

does not forfeit the claim on appeal. (See *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence' "].)

We also reject the Attorney General's claim of harmless error. "An instruction on an invalid theory may be found harmless when 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory. [Citation.]" (*In re Martinez* (2017) 3 Cal.5th 1216, 1226.) "Unlike with other types of instructional error, prejudice is *presumed* with this type of error." (*People v. Jackson* (2018) 26 Cal.App.5th 371, 378.) Although there was strong evidence that defendant unlawfully drove the vehicle, there was also evidence he stole it. The vehicle was found operating without the use of a key in the ignition, and a screwdriver and a pair of pliers were found in the back seat. This supports a finding that the vehicle was taken without its key and defendant was the person who took it. Likewise, nothing in the jury's verdicts supports an inference that it relied on unlawful post-theft driving rather than unlawful taking. While a prosecutor can elect to abandon one theory of guilt in favor of another, this did not happen here. "If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.) At one point, the prosecutor argued, in reference to Vehicle Code section 10851, "[i]t just means a vehicle theft." The prosecutor never disavowed the vehicle theft theory, and did not make the clear election needed to overcome the presumption of prejudice.

In cases involving instructional error related to the $950 element of unlawful taking of a vehicle, the remedy is to vacate the conviction, remand, and allow the People to elect whether to retry the defendant on the felony charge, or accept the conviction's reduction to a misdemeanor. (See *People v. Jackson*, *supra*, 26 Cal.App.5th at p. 381;

People v. Bussey (2018) 24 Cal.App.5th 1056, 1062; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857-858.) We do so here.

DISPOSITION

The conviction for unlawful taking or driving is reversed and the sentence is vacated in its entirety. In all other respects, the judgment is affirmed. The matter is remanded to the trial court, where the People must file an election within 30 days of the issuance of our remittitur either to retry defendant for felony unlawful taking or driving, or to accept a reduction of this count to a misdemeanor, after which the trial court may resentence defendant accordingly. In all other respects, the judgment is affirmed.

HULL, Acting P. J.

We concur:

MAURO, J.

MURRAY, J.